

PD-0804-19

IN THE COURT OF
CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
9/9/2019
DEANA WILLIAMSON, CLERK

JOE LUIS BECERRA,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Petition for Discretionary Review from the
Tenth Court of Appeals in No. 10-17-00143-CR
affirming the conviction in Cause Number
14-03925-CRF-361 from the 361st District Court of
Brazos County, Texas

APPELLANT'S RESPONSE TO STATE'S REPLY
TO PETITION FOR DISCRETIONARY REVIEW

ORAL ARGUMENT REQUESTED

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Trial Judge:	Presiding Judge Steve Smith (Jury Selection) Senior Visiting Judge J.D. Langley (Trial) 361 st District Court 300 East 26 th Street, Suite 420 Bryan, Texas 77803 Telephone: 979.361.4220 Fax: 979.361.4380

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REPLY POINT NUMBER ONE

Appellant's Motion for New Trial presented uncontroverted extra-record evidence courts have long held preserve error on claims grounded in juror misconduct

ARGUMENT

The State's Response arguing against the grant of review centers upon the following contention:

This Court has held that a motion for new trial is sufficient to preserve error where there was "no opportunity to object to the trial court's action until after that action was taken." *Issa v. State*, 826 S.W.2d 159, 161 (Tex. Crim. App. 1992). On the other hand, where a defendant has the opportunity to object, a motion for new trial does not preserve error. See *Hardeman v. State*, 1 S.W.3d 689, 690 (Tex. Crim. App. 1999).

The court of appeals opinion is consistent with this Court's precedent in *Issa* and *Hardeman*. Appellant had the opportunity to object during trial when the trial court sent the alternate juror into the jury room after closing arguments. The court of appeals correctly observed that Appellant's trial counsel was aware that an alternate had been selected during voir dire, and that the alternate was sitting with the jury throughout trial and at the time the jury was sent to deliberate. *Becerra*, 2019 WL 2479957, at *2.

State's Reply pg. 3-4.

Issa and *Hardeman*, quoted above, analyzed against the evidentiary record in this case, illustrate why Appellant's Petition for Discretionary Review ("PDR") should be granted. *Trinidad* held statutorily based Article 38.22 claims (as opposed to Constitutionally based Article V, Section 13 claims and Article 33.01 statutory claims) were subject to contemporaneous objection, but the Court in *Trinidad* outlined how the specific facts of that case and the companion case, *Adams v. State*, 275 S.W.3d 23

(Tex. App. – San Antonio 2008), required contemporaneous objection to avoid procedural default:

In each of the instant cases, the trial court announced in open court on the record that it would permit the alternate juror to remain ‘with the jury while it is deliberating.’ The appellants had every opportunity to object that the trial court's attempts to comply with the recent amendment to Article 33.011(b) [the change in the alternate juror amendment from 2007] of the Code of Criminal Procedure, would run afoul of Article 36.22, but they did not do so. Under these circumstances, we sustain the State's assertion that these appellants have procedurally defaulted their statutory arguments on appeal, and we hold accordingly that the court of appeals erred to reach the merits of their statutorily based claims.

Trinidad v. State, 312 S.W.3d 23, 29 (Tex. Crim. App. 2010) (emphasis added).

In this case there was no front end “announcement in open court on the record that it would permit the alternate juror to remain ‘with the jury while it is deliberating.’” *Id.* A reading of decisions in this Court and the intermediate Court of Appeal in *Trinidad* and *Adams* make plain the trial courts in those cases were instructing their jurors in an attempt to incorporate the 2007 legislative changes to Article 33.011(b). In those cases, all parties knew this before deliberations began in the trial court, yet the defendants did not object, forcing reliance on the *Marin*¹ requirement of affirmative waiver rights to avoid procedural default on appeal. *Trinidad* at 26.

¹ The State's Response did not engage on Appellant's contention this evidentiary record presents the opportunity to address what *Trinidad* could not: Whether, if otherwise procedurally defaulted, the Texas constitutional and statutory right to twelve jurors is a waiver only right under *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993).

At issue in this case is an attempted curative instruction following 46 minutes of thirteen jurors deliberating and voting on the verdict. That *Issa* and *Hardeman* support Appellant's position is illustrated by the Trial Court's question to Trial Counsel immediately before Trial Counsel's overruled request for mistrial:

[TRIAL COURT]: Well, do you have any problem with [the proposed curative instruction], David?

[APPELLANT'S TRIAL COUNSEL]: Not with the instruction, Your Honor, but I think I'm compelled to ask for a mistrial based on the presence of the juror, preserving any error, if any.

[TRIAL COURT]: I understand. In making that objection, do you have any indication of harm at this point?

[TRIAL COUNSEL]: No, sir, I don't at this point.

(4 RR 42) (emphasis added).

It was not until after trial that extra-record evidence was uncovered that the alternate juror had deliberated on and voted on the verdict, but also that no re-vote occurred on that verdict.² In other words, it was not until the post-trial stage the harm the Trial Judge was asking Trial Counsel about during trial was discovered and reduced to affidavit supporting Appellant's Motion for New Trial.

² The State's Response argues "a true claim from Article V, Section 13 would include in its facts that a thirteenth juror had rendered the **ultimate** verdict of guilt." (citing *Trinidad*) (original emphasis). State's Response at pg. 6. This assertion makes Appellant's point that the extra-record juror affidavit supporting his Motion for New Trial was necessary to preserve error. That affidavit attested no re-vote occurred after the alternate juror was discovered and separated. The Trial Court received a verdict from the petit jury minus the alternate, but that verdict was neither re-deliberated nor re-voted upon. To write the ultimate verdict did not include the thirteenth juror's vote under the evidentiary record here developed elevates form over substance.

This Court and Courts of Appeal have long held statutory based juror misconduct claims require either a motion for mistrial or a juror supported motion for new trial to avoid procedural default. *See e.g., Trout v. State*, 702 S.W.2d 618, 620 (Tex. Crim. App. 1985) (“A motion for new trial is the proper course to be taken in preserving alleged jury misconduct error for appeal. It is further required that such motion for new trial be supported by the affidavit of a juror[.]”); *Menard v. State*, 193 S.W.3d 55, 59 (Tex. App. – Houston [1st Dist.] 2006, pet. ref’d), (same, quoting *Trout*.); *Castillo v. State*, 319 S.W.3d 966, 970 (Tex. App. – Austin 2010, pet. denied) (To preserve error [of] juror misconduct, the defendant must either move for a mistrial or files a motion for new trial supported by affidavits of a juror[.]” (quoting *Trout* and *Menard*)).

Issa and *Hardeman* involved probation revocation proceedings, specifically motions to proceed, in which defendants did not request bifurcation of adjudication and punishment stages and put on no punishment evidence. In *Issa*, a per curium opinion, this Court reversed the Tenth Court of Appeals decision that procedural default occurred, observing: “Thus based on [the community supervision statute the in effect], the defendant is entitled to a punishment hearing after the adjudication of guilt, and the trial judge must allow the accused he opportunity to present evidence.” 826 S.W. 159, 161 (Tex. Crim. App. 1992) (emphasis in the original).

This Court then went on to answer the dissent’s assertion of procedural default, writing no opportunity existed to object to the trial court’s action until after

adjudication and pronouncement of sentence. *Id.* In *Hardeman*, the defendant attempted to rely on an unsupported motion for new trial. 1 S.W.3d 689, 690 (Tex. Crim. App. 1999). This Court distinguished *Issa* by holding “[Defendant] does not allege such a lack of opportunity to object.” *Id.*

Neither *Hardeman* nor *Issa*, involved, as here, a supported extra-record juror misconduct allegation grounded in constitutional and statutory based error. Neither *Hardeman* nor *Issa* was cited by the Court of Appeals in disposing of Appellant’s Motion for New Trial preservation arguments. In short, neither *Issa* nor *Hardeman* can bear the load the State attempts to place upon them in arguing they support procedural default of Appellant’s Constitutional and statutory claims.

REPLY POINT NUMBER TWO

The State Response does not dispute this case presents an evidentiary record sufficient to construe Articles 33.01, 33.001(b) and 36.22 of the Texas Code of Criminal Procedure and Article V, Section 13 of the Texas Constitution in light of this Court’s decision in *Trinidad v. State*

ARGUMENT

The State’s Response to Appellant’s PDR did not dispute Appellant’s assertions in that filing that this case is the first published opinion in Texas holding procedural default occurs despite the existence of uncontroverted extra-record claims made as part of a Motion for New Trial and supported by affidavit from a person with personal knowledge.

Neither does the State dispute this is the first precedential case in Texas holding a sufficiently specific Motion for Mistrial made in response to a curative instruction nevertheless results in procedural default of all grounds thereafter sought to be preserved. According to the Court of Appeals, procedural default occurred because the triggering event was “[s]ufficiently apparent when it happened.” *Becerra* at *2. Yet the same event was also missed by a Trial Judge of thirty years’ experience, court personnel, and two senior Brazos County Assistant District Attorneys. All had reason to speak up if apparent, but did not. The Court of Appeals baseline for “sufficiently apparent” does not hold under scrutiny.

Perhaps more important, this case presents the Court with the first sufficient evidentiary record since 2007 to allow construction of amendments to Article 33.001(b) of the Texas Code of Criminal Procedure for alternate jury service. This case additionally presents a sufficient evidentiary record to decide the parameters of Article V, Section 13 of the Texas Constitution and Article 33.01 of the Texas Code of Criminal Procedure in light of *Trinidad* and possibly construe and reconcile Rule 606(b) of the Texas Rules of Evidence with those provisions.

Finally, this case presents a sufficient evidentiary record to possibly decide a question open since *Trinidad* was decided almost a decade ago: Whether Article V, Section 13 and Article 33.01 are waiver only rights under *Marin* analysis.

PRAYER FOR RELIEF

The Court of Criminal Appeals should grant discretionary review, order briefing on the merits and oral argument. Following submission, this Court should reverse and remand this case to the Tenth Court of Appeals with instructions to reach the merits of Appellant's Constitutional and statutory claims.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

This Petition for Discretionary Review complies with TEX. R. APP. P. 9.4(i)(2)(D) in that it contains 1,664 words in Microsoft Word 2019, Garamond, 14 point.

/s/ LANE D. THIBODEAUX
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above has been delivered *via* electronic filing on this the 6th day of September, 2019 to the following:

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